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Supreme Court of the United States

October Term, 1971

No. 71-681

THOMAS LEONARD O'BRIEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Supreme Court of the United States

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THOMAS LEONARD O'BRIEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on August 18, 1971. (Petition for rehearing was denied on October 21, 1971.)

Opinions Below.

The district court did not render an opinion or written findings. The opinion of the Court of Appeals is not yet reported; it is set forth in the Appendix to this Petition, as is the Order denying the petition for a rehearing before the Ninth Circuit.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 18, 1971. Petition for a rehearing, with a suggestion for a rehearing *en banc* was denied on Oc-

tober 21, 1971, after the panel of the Court of Appeals considering the case requested that the Government respond to that Petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

Question Presented.

Was the trial court's "comment on the evidence" to the jury (to the effect that if the jury believed the Petitioner's testimony then it was to consider that he had made a "judicial confession" to the elements of the offense), a direction of the verdict on an element of the offense charged, in light of the defendant's testimony which showed that defendant was confused about the validity of the induction order since the United States Attorney had previously refused to prosecute defendant for a violation of a previous order (which created a "continuing duty" upon the Petitioner to report under the order for which he was prosecuted) because the United States Attorney felt that the outstanding induction order was defective and had so notified Petitioner?

Constitutional, Statutory and Regulatory Provisions Involved.

United States Constitution, Fifth Amendment, Due Process Clause:

> ". . . nor shall any person . . . be deprived of life, liberty or property, without due process of law. . . ."

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . .

Military Selective Service Act of 1967, § 12(a); 50 U.S.C. App. § 462(a):

> . . . [A]ny person who in any manner shall **knowingly fail or neglect or refuse** to perform any duty required of him under or in execution of this title, or rules, regulations or directions made pursuant to this title, . . . shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or both such fine and imprisonment. . . . [Emphasis added.]

Statement of the Case.

The Petitioner, Thomas Leonard O'Brien, duly registered with Selective Service Local Board 7 in Waterloo, Iowa, on May 1, 1962. After holding a II-S classification throughout his college career, Petitioner was placed in the class I-A on March 9, 1967, and thereafter, on May 22, 1967, was ordered to report for a physical examination on June 1, 1967.

On June 12, 1967, Petitioner was mailed an Order to Report for Induction (SSS Form 252) July 11, 1967. The reporting date of the Induction Order was postponed on the date of mailing in order to allow the Petitioner to process through for Naval officer Candidate School. On October 19, 1967, Petitioner was reclassified II-A, cancelling the previous Induction Order.

On February 15, 1968, Petitioner was again classified in class I-A. On March 19, 1968, Petitioner was mailed a new Induction Order on SSS Form 252, requiring him to report on April 2, 1968. On March 28,

1968, Petitioner requested another postponement of his induction because of another pending application to Naval Officer Candidate School. On April 1, 1968, Petitioner informed the Local Board that his OCS application had been refused by Naval authorities. Petitioner then applied for a transfer of his induction to Nevada where he was then living, and it was granted. He was ordered to report for induction on April 29, 1968.

Soon thereafter, however, Petitioner requested conscientious objector status after speaking to his brother who had just returned from Vietnam and determining he was a conscientious objector. On April 29, 1968, Petitioner filed SSS Form 150 with the Local Board and requested his induction be cancelled until due consideration was given to his I-O request. On April 30, 1968, Petitioner refused to submit to induction.

On May 2, 1968, the Local Board, proceeding improperly under Regulation Section 1625.4 "determined not to reopen and consider anew present classification" and so informed Petitioner by letter. On May 14, 1968, Petitioner was declared delinquent. From June 4, 1968, to September 3, 1968, Petitioner's File was reviewed by Iowa State Headquarters.

On February 27, 1969, the United States Attorney's Office for the Central District of California* refused to prosecute Petitioner for refusal since, according to the United States Attorney, the Induction Order was

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*Venue was obtained in the Central District since Defendant was ordered to and refused to submit to induction at the Los Angeles Armed Forces Examining and Entrance Station.

made invalid by the Local Board's failure to meet, consider, and vote upon Petitioner's April 29 request for postponement or cancellation of his Induction Order and by the Local Board's failure to vote on the question of re-opening Petitioner's classification. The United States Attorney suggested that the Local Board consider Petitioner's SSS Form 150 and record the vote in the Minutes of Action. Petitioner was notified of the U.S. Attorney's request.

On May 13, 1969, acting under Section 1625.4 of the Regulations, as directed by the Iowa State Headquarters, the Local Board granted Petitioner a "courtesy interview." The Local Board determined that Petitioner did not make out *prima facie* case (under a "basis-in-fact" rather than a "substantial evidence" test) to warrant a reopening.

On May 29, 1969, a letter was mailed "advising Registrant to report" for induction on June 17, 1969, *based upon the previous induction order "found defective" by the United States Attorney*. Petitioner requested transfer of his induction to Nevada. On July 8, 1969, the Petitioner refused induction at the Los Angeles Armed Forces Examining and Entrance Station (AFEES), having had his order transferred to Nevada, and having been transported to Los Angeles, the closest AFEES.

At the trial Petitioner testified at length concerning his confusion at the time he refused induction about the validity of his order for induction [Rep. Tr. pp. 88-101; 104-109], which order was a "continuing duty" order of the order previously declared defective by the United States attorney.

In his charge to the jury, the District Judge, the Honorable Manuel L. Real, stated if "you believe the testimony of the defendant, then the defendant has made a judicial confession to the elements of the offense charged in the indictment" [Rep. Tr. p. 131].

Based *inter alia* upon this "comment" to the jury, Petitioner timely made motion for a new trial which was denied by the District Judge.

The case was appealed to the Ninth Circuit which affirmed the conviction *per curiam* and did not pass upon nor even mention the non-frivolous issue raised here.

REASONS FOR GRANTING THE WRIT.

Certiorari should be granted because the decision below is in conflict with the decisions of the Courts of Appeals for the Second, Fifth, Sixth and Eighth Circuits and with the applicable decisions of this Court. Certiorari might also be considered, along with a remand and direction to consider this non-frivolous issue, as part of this Court's supervisory power over the Federal Judiciary, since it seems apparent from the terse *per curiam* opinion of the Ninth Circuit that the issue now raised here, and raised and extensively briefed below, was never considered by the Court of Appeals. (In Petitioner's Petition for Rehearing, with a Suggestion for a Rehearing *En Banc*, it was also pointed out to the Court of Appeals that it had not passed upon the question raised here. Generally, however, the Petition for Rehearing dealt with another issue, not here raised, and in denying a rehearing and a rehearing *en banc* the Court of Appeals again overlooked or ignored the issue raised here).

The Trial Court Abused Its Discretion to Comment on Evidence and Its Instruction on This Issue Was, in Effect, Tantamount to Directing the Jury to Bring in a Verdict of Guilty.

In his charge to the jury, the trial judge instructed the jury as follows:

> In this connection, I am commenting on the evidence in this case, as permitted by the law of the United States, and you do not have to accept the comments in your findings of the facts, if you believe the evidence of the Defendant, his testimony, then I can tell you if you believe and you find

that you believe the testimony of the Defendant, *then the Defendant has made a judicial confession to the elements of the offense charged in the indictment.* [Reporter's Transcript at 134; emphasis added].

It is, of course, clear that the Court did instruct the jury that it did not have to accept the comments of the Court's finding of the facts. This may be true, but it had no effect insofar as this instruction to the jury was concerned. Counsel for the Petitioner had, of course, argued strongly to the jury in closing argument that the Petitioner had told the truth. The Court, it is contended, based its instruction on an improper legal standard and also exceeded its discretion to comment on the evidence. The Court's instruction would, if at all, be proper only if this were considered to be a "strict liability" crime. But, in addition to that, the Court went further than just commenting on the evidence as to its credibility, materiality, etc. What the Court in effect did was to bypass any direct comment on the evidence and directly make a legal conclusion based on a wrong standard of law. In so doing, it directed a jury verdict, at least as to the "intent" element of the offense charged.

A. "Intent" Is an Element of the Offense Charged.

Section 12(a) of the Military Selective Service Act of 1967 (50 U.S.C. Appendix § 462(a)) establishes the element of "knowingly" as the *mens rea* requirement. The *mens rea* requirement in the crime charged requires a showing and finding of specific intent before a conviction may be obtained. This court, in the case of *Morissette v. United States*, 342 U.S. 246 (1952) in-

dicated the proper province of the jury in passing upon "knowing" or "wrongful" intent. In that case, the defendant was convicted of "knowingly converting" government property. Mr. Justice Jackson stated in part as follows:

> The court thought that the only question was, "did he intend to take the property?" That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defense testimony and all the surrounding circumstances.
>
> . . .
>
> Had the jury convicted on proper instructions, it would be the end of the matter. But juries are not bound by what seems to be inescapable logic to judges.

342 U.S. at 275-76.

> Had the statute applied to conversion without qualification, it would have made crime of all unwitting, inadvertent and unintending conversions. *Knowledge, of course, is not identical with intent and may not have been the most apt word of limitation, but knowing conversion requires more than knowledge that the defendant was taking the property into his possession.* He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion. In the case before us, whether the mental element that Congress required be spoken of as knowledge or

> intent, would not seem to alter its bearing on guilt.

Id. at 270-71 [emphasis supplied].

Thus it can be drawn from the *Morissette* case the general proposition that the imposition of the *mens rea* requisite as a proper element of the offense removes any aspect of "strict liability" which might otherwise prevail (*e.g.*, did he have a duty to register or submit to induction? Did he do so?) The Petitioner's "cognizance" of the fact that he was picking up and removing property was not a sufficient attribute of the *mens rea* requirement to allow a conviction to stand. The defendant had to *know more*. As Justice Jackson indicates, he had to *know* that he was *making a conversion*. In the instant case, the prosecution had to show that Petitioner knew that he had a legal duty to submit to induction (and, as shown by his testimony, Petitioner's knowledge of that duty was not so clear) and that by failing to submit to induction, the Petitioner thus knew he was violating the law and "knowingly refused".

Just as *Morissette* discussed the mental element of knowledge, *United States v. Murdock*, 290 U.S. 389 (1933) discussed the mental element of "willfulness":

> The word often denotes an act which is intentional or knowing or voluntary as distinguished from accident. But when used in a criminal statute, it generally means an act done with bad purpose . . . without justifiable excuse . . . . The word is also employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right to act. . . .

290 U.S. at 394-95 (citations omitted).

The *Morissette* and *Murdock* cases explain the effect of Congress' choice of words "knowingly" and "willfully." (Indictments in Selective Service cases often use the terms "knowingly" and "willfully" interchangeably. See, for example, *United States v. Rabb*, 394 F. 2d 230 (3rd Cir., 1968); *United States v. Kurila*, 1 S.S.L.R. 3356 (6th Cir., 1969); *United States v. Bruinier*, 1 S.S.L.R. 333 (D. Ore. 1968); *Ex parte Stewart*,[1] 47 F. Supp. 415, at 417 (D.C. Cal., 1942).)

In the *Stewart* case, cited parenthetically above, the court in passing upon the element of *scienter* in violation of the Selective Training and Service Act of 1940, 50 U.S.C. App. § 301 *et seq.*, said:

> However, because the statute uses the word 'knowingly' . . . which implies willful knowledge and specific intent, we have allowed defendants in Selective Service cases to give their reasons for failure to obey as going to intent.

See, also *United States v. Hoffman*,[2] 137 F. 2d 416, at 419 (2d Cir., 1943); *United States v. Mancuso*, 139 F. 2d 90 (3rd Cir., 1943); (*per Goodrich*, J.) (mistaken belief of defendant as to legal effect of civil litigation as affecting validity of induction order *held* exculpatory).

B. The Issue of "Intent" Was Removed From the Jury's Consideration by the Trial Judge's "Comment".

To inform the jury as the judge here did, that it did not have to accept the Court's comments was an empty statement, particularly in light of the fact that the Petitioner's testimony was not impeached and the

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[1]It is noteworthy that *Stewart* was cited with approval by Judge McAllister in dissent to the Sixth Circuit's *Morissette* decision. 187 F. 2d 427, 433 (6th Cir., 1951), overturned by this Court.

[2]*Hoffman* was also cited by Judge McAllister in the *Morrissette* dissent. See note 1, *ante*.

Court in effect instructed the jury that if it believed the Petitioner, everything he stated amounted to a confession of guilt. This was not only highly prejudical but it was tantamount to a directed verdict.

> It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight and that his slightest word or intimation is received with deference, and may prove controlling.

Star v. United States, 153 U.S. 614, 626 (1894).

There are numerous cases holding that the trial judge's "comments" on the evidence go beyond permissible limits where such comments could be easily interpreted and construed as an expression of the Court's or of the Judge's belief that the Defendant was guilty, and it is not an effectual remedy that the jurors were admonished that it was the sole judge of the facts and not to be controlled in that function by what the Court said. *See United States v. Porter*, 386 F. 2d 270 (6th Cir. 1967); *see also United States v. Murdock, supra*; *and United States v. Woods*, 252 F. 2d 334 (2d Cir. 1958), where the Court of Appeals for the Second Circuit held it was reversible error for the trial judge to tell the jury that he personally believed the Defendant was guilty even though he admonished the jury three times that it was the sole trier of the facts.

The "intent" issue is, of course, of particular importance in this case. It has been held that where intent of the accused is an element of the crime charged, its existence is a question of fact which must be submitted to the jury, and the trial court may not withdraw or prejudge the issue by an instruction that

the law raises a presumption of intent from an act. *See, e.g., Morissette v. United States, supra.*

In the case of *Garcia v. United States*, 289 U.S. 466 (1933), Chief Justice Hughes, directing his attention to the powers of a trial judge to comment on the evidence, stated:

> The privilege of the Judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony, he may not assume the role of a witness. But he may analyze and dissect the evidence, . . . he may neither distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses.

The law is quite clear that a verdict of guilty may not be directed in a criminal case. See *United States Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395, 408 (1947); *Compton v. United States*, 377 F. 2d 408, 411 (8th Cir., 1967); *Edwards v. United States*, 286 F. 2d 681, 683 (9th Cir., 1960); *Bearden v. United States*, 403 F. 2d 782, 787 (5th Cir.) *cert. denied* 393 U.S. 1111 (1968).

It is also quite clear that a Court may not partially direct a verdict or in effect direct a verdict under the color of its discretionary power to comment on the evidence. *See Brien v. United States*, 373 F. 2d 403 (5th Cir., 1967), wherein the Court refused to submit in the issue to the jury whether a weapon was a "firearm" within the meaning of the statute. The Court held this was a partial direction of a verdict and required

a reversal. *See also Strauss v. United States*, 376 F. 2d 416 (5th Cir. 1967).

It has also been held that an instruction deciding a material fact issue as a matter of law adversely to the accused is regarded as a partially directed verdict of guilty prohibited by the Fifth and Sixth Amendment doctrines that the trial court has no power to direct a verdict of guilty. *Nimms v. United States*, 375 F. 2d 135 (5th Cir., 1967). In effect, it is respectfully submitted that the trial court in Petitioner's case effectively directed a verdict or at least partially directed a verdict.

Clearly, the issue raised below, and now here, was not frivolous. Indeed, it was extensively briefed by both parties and should not now either be ignored by the Court of Appeals or be allowed to be implicitly decided by that Court in the manner in which it was "determined".

Conclusion.

The Petition for a Writ of Certiorari should be granted. In the alternative, this Court should consider the approprjateness of remanding this cause to the Court of Appeals with instructions to hear and determine the issue raised herein.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Appellee, v. Thomas Leonard O'Brien, Appellant. No. 26643.

Appeal from the United States District Court for the Central District of California.

Filed: August 18, 1971.

Before: BARNES and ELY, Circuit Judges, and SOLOMON, District Judge.*

PER CURIAM:

O'Brien was convicted for his refusal of induction into the Armed Forces, in violation of 50 U.S.C. App. §462. On appeal, O'Brien makes numerous claims, only one of which may have been thought to have possible merit. This is the contention that the State Selective Service Director had authorized a reopening of O'Brien's late-matured conscientious objector claim in a letter recommending that the local board follow Local Board Memorandum No. 41 and grant O'Brien a "courtesy interview." However, this argument was recently resolved, adversely to O'Brien's position, in *United States v. Wood*, ... F.2d ...., ... n. 1 (9th Cir. July 15, 1971).

Affirmed.

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*Honorable Gus J. Solomon, United States District Judge, Portland, Oregon, sitting by designation.

Order.

United States Court of Appeals, for the Ninth Circuit.

Thomas Leonard O'Brien, Appellant, v. United States of America, Appellee. No. 26643.

Before: BARNES and ELY, Circuit Judges, and SOLOMON, District Judge.*

Filed: October 21, 1971.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Hon. Gus J. Solomon, United States District Judge, Portland, Oregon, sitting by designation.